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Supreme Court, U.S.
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No. 04-712

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY and
STATE OF WISCONSIN INVESTMENT BOARD,

Petitioners,

v.

CHRISTOPHE ROCHE and JUANITA ROCHE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit's judgment pronounced any new diversity of citizenship standard for an unincorporated business association.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Christophe Roche and Juanita Roche are individual United States citizens and are not corporations or publicly owned companies.

TABLE OF CONTENTS

Page

Question Presented i

Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities v

Introduction 1

Counter-Statement of the Case 4

Reasons for Denying the Petition 8

I. Lincoln Has Not Ariculated A Compelling Reason To Justify Discretionary Review By This Court 8

II. The Question Presented By Petitioner Of Whether An Entity Not Named As A Defendant In The Lawsuit Can Nonetheless Be Deemed A "Real Party In Interest" To Destroy Diversity Of Citizenship Has Been Answered But Is Irrelevant In A "Persons Composing" Test Case 9

Contents

Page

A. The Supreme Court Has Applied The "Persons Composing" Test To All Forms Of Unincorporated Associations (Except For A Business Trust Like In *Navarro*) And Since Lincoln Was Treated Like A Partnership, This Issue Is Moot 9

B. This Court Has Examined An Entity Not Named As A Party To Find A Lack Of Diversity Of Citizenship 10

III. There Is No Circuit Split On The Question Presented 10

A. The Law Is Clear On The Jurisdictional Rule 10

B. There Is No Massive Uncertainty Over Whether Non-Named Affiliates Will Destroy Diversity Jurisdiction, Causing Panic To The Business Community ... 13

C. The Fourth Circuit's Judgment Pronounced No New Citizenship Test For A Limited Partnership 13

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

Cases:

Cardon v. Arkoma Associates,
494 U.S. 185 (1990) ..... *passim*

Chapman v. Barney,
129 U.S. 677 (1889) 9, 10

Great Southern Fire Proof Hotel Co. v. Jones,
177 U.S. 449 (1900) 9, 10

Lumberman's Mutual Casualty Co. v. Elbert,
348 U.S. 48 (1954) 3, 11

Marshall v. Baltimore & Ohio R. Co.,
16 How. 314, 14 L. Ed. 953 (1854) 12

Navarro Sav. Ass'n v. Lee,
446 U.S. 458 (1980) ..... *passim*

Roche v. Lincoln Property Co.,
373 F.3d 610 (4th Cir. 2004) ..... *passim*

Simpson v. Providence Washington Ins. Group,
608 F.2d 1171 (9th Cir. 1979) 12, 13

St. Louis & S. F. R. Co. v. James,
161 U.S. 545 (1896) 12

Steelworkers v. Bouligny, Inc.,
382 U.S. 145 (1965) 9, 10

Cited Authorities

	Page
Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57 (1st Cir. 1983)	14
Thomas v. Board of Trustees, 195 U.S. 207 (1904)	12
Wood v. Davis, 18 How. 467, 15 L. Ed. 460 (1856)	12
Statutes and Rules:	
28 U.S.C. § 1332	12, 14
28 U.S.C. § 1441	12
Fed. R. Civ. P. 17	*passim*
Fed. R. Civ. P. 30	4
U.S. Sup. Ct. R. 15	5

Cited Authorities

	Page
Other Materials:	
6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2d ed. 1990)	6
Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 51 Minn. L. Rev. 675 (1967)	6
Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243 (1978)	12

INTRODUCTION

The "Question Presented" is answered in the negative. The Fourth Circuit opinion offered no new standard for determining diversity of citizenship jurisdiction. *Roche v. Lincoln Property Co.*, 373 F.3d 610 (4th Cir. 2004), was simply a case where the court found that the removing party was some type of unincorporated business entity, and did not carry its burden of proving diversity of citizenship for the named party defendant, Lincoln Property Company. The court applied the *Cardon v. Arkoma Associates*, 494 U.S. 185 (1990), principle to this properly "joined and served" party defendant.

Petitioner raised some interesting academic questions from the circuit court's analysis of the "real party in interest" concept: First, Petitioner suggested that the "real party in interest" concept did not apply to defendants, contending that the court confused it with procedural Rule 17(a). Second, it criticized the Fourth Circuit for deepening a conflict among the circuits when none exists. Third, Petitioner claimed that the court wrongfully applied the principle of the "real party" to a non-named party. Then Petitioner suggested that the *Roche* judgment created a new standard called a "very close nexus" test for determining diversity of citizenship of a limited partnership.

The issue on a "not named" party destroying diversity has been decided by this Court. However, that question is irrelevant because whether Lincoln was either in a limited partnership or some other unincorporated association, the "persons composing" test would still have been employed. And for the same reason, the entire exercise discussing the real party to the controversy may have been superfluous.

Roche presented a straight-forward "count each member of the entity" case.

Because of the confusing structure of the Lincoln group of enterprises, and Petitioner's failure to disclose all of the necessary jurisdictional facts, the Fourth Circuit resolved the disorder by analyzing who was the "real party to the controversy." But the court then applied *Cardon*, *supra*, as the purported entity was a limited partnership. The Fourth Circuit's methodology was correct under either analysis. More significant is that for Supreme Court review purposes, the battle over the "real party" analysis of *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980), versus the "citizenship of an artificial entity" was fought and decided in *Cardon*. Further review of these familiar issues is unnecessary, particularly where the circuit court's judgment was right even for ostensibly irrelevant reasons.

Below are introductory responses to Petitioner's "Questions Presented:"

1. The jurisdictional "real party in interest" rule is applicable to both plaintiffs and defendants. The Fourth Circuit applied the rule to the named and served defendant, the entity "Lincoln Property Company." The record demonstrated that Lincoln was a partnership, not a corporation; therefore, the Fourth Circuit considered the citizenship of the members of the unincorporated association (a limited partnership) in accordance with *Cardon* principles.

The Petitioner mistakenly argues that the **jurisdictional** "real party in interest" concept applies only to claimants (plaintiffs), a view that this Court has never taken. The Petitioner confuses the procedural Rule 17(a) with the "never

can be waived" jurisdictional rule on diversity of citizenship. The Fourth Circuit's holding is consistent with not only this Court's rulings but also all the other circuits.

Petitioner's error stems from their misunderstanding of the "real party to the controversy" concept as discussed in *Navarro* and *Cardon*. The real party in interest rule has guided courts in the application of the diversity jurisdiction statute whenever the named parties were not the parties considered for diversity. As stated in *Navarro*, a rough symmetry came about between procedural Rule 17(a) and the jurisdictional real party in interest rule, but the jurisdictional rule continues as the general rule governing which parties are relevant for jurisdictional purposes. This Court reaffirmed the jurisdictional "real party in interest" rule in *Lumberman's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), where the jurisdictional rule was applied to the defendant party.

The Fourth Circuit's discussion in reference to the real party in interest rule neither raises nor creates conflict among the circuits. The decision of the Fourth Circuit was consistent with long-standing precedence, involved no new question of federal law, and presented no issue of federal law with significant practical consequence. The Petitioner's argument is very creative but demonstrates merit less matter for review because of its misconception of the jurisdictional rule.

2. The *Roche* court never pronounced a new diversity test for determining citizenship of a limited partnership. The "very close nexus" words used by the Petitioner were taken entirely out of context and spun by Petitioner in its attempt to hopefully make its Petition "certworthy." The Fourth Circuit was using the "very close nexus" words

in an explanation of federalism and the purpose of the policy behind diversity jurisdiction. Petitioner has mischaracterized this dicta discussion into a claim that the judgment created a new diversity test, something just as twisted and mistaken as its first question presented which claimed that the real party in interest concept does not apply to defendants.

The *Roche* decision was simply a case where the removing defendant did not carry its burden in establishing diversity (the district court mistakenly shifted that burden to the plaintiff), and the district court erred by weighing evidence in favor of the removing party. The Petitioner has tried to conjure up a split when none exists; the issues are all well settled and have been addressed by the Supreme Court on numerous occasions.

COUNTER-STATEMENT OF THE CASE

The Respondents adopt the statement of the facts as set forth by the Fourth Circuit in the underlying opinion, *Roche* at 612-613. These facts show that the named and served defendant, Lincoln Property Company, was a partnership with a Virginia partner. *Id.* at 616. Lincoln complemented its own company's Rule 30(b)(6) designee's testimony that "Lincoln was a partnership" by submitting confusing declarations. *Id.* at 617-19. These submissions identified other **partners** of Lincoln who had an interest in the controversy. ["Nonetheless, at oral argument and in its briefs, Lincoln admitted that 'the entity that receives the management fees for Westfield Village Apartments' is 'EQR/Lincoln Limited Partnership.'" *Id.* at 618.]

The Fourth Circuit used the jurisdictional "real party in interest" concept to conclude: first, that Lincoln was a named and served defendant (plaintiffs claimed that Lincoln was a nominal party and "that Lincoln's Virginia entity was the real and substantial party in interest, without whom they cannot be made whole. And, Lincoln has been made a party to the lawsuit." *Id.* at 615 n.5); second, since the record demonstrated that the named/served Lincoln party was a limited partnership, *Cardon* was applicable, whereby all members of the entity had be shown to be diverse; and, third, Lincoln could not prove diversity for a number reasons, including that in examining the citizenship of its **corporate** partners, Petitioner had placed in the record mere conclusory allegations, not facts to support the "principal place of business" test, and had not identified all the limited partners. The holding of the *Roche* judgment was simply this: "At the end of the day, the burden of establishing diversity remained upon Lincoln. And, Lincoln failed to carry its burden." *Id.* at 621.

Respondents point out the following perceived misstatements of fact and law in the Petition pursuant to Supreme Court Rule 15(2):

1. Petitioner states as a reason for granting the petition: "A clear majority of circuits, on the other hand, hold that the 'real party in interest' analysis applies only to determining a *plaintiff's* citizenship and not a defendant's at all." Pet. 8. No cases cited by the Petitioner, nor academic article, Law Review, treatise or otherwise, suggest such a schism exists among the circuits concerning applicability of

the jurisdictional rule to plaintiffs, and not defendants.[1] [The Petitioner's reference to 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543, at 339 (2d ed. 1990), at p. 11 of its Petition is misplaced. There, it refers to the procedural rule, which can be waived if not timely challenged. For history and purpose of Rule 17, *see id.* at § 1541.]

2. The Court of Appeals did not hold that the citizenship of a non-named entity, which was a limited partnership, must be determined by its supposedly "very close nexus" to Virginia rather than solely on the citizenship of its members. The context of the once used words "a very close nexus" with Virginia is found at 373 F.3d at 621. There, the court is in the midst of discussing the elementary policy behind diversity jurisdiction. The court goes on to explain the purpose of diversity jurisdiction is to provide a tribunal free from local prejudice. In that discussion, it mentions that the nominal named party defendant, Lincoln Property Company, is not alien to Virginia, and that the ostensible real party in interest "owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth . . ." This is mere dicta, which discusses why the defendants in this particular case should not have concerns that a state tribunal cannot provide a fair trial. *Id.* at 620-21.

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1. However, commentators do suggest that Rule 17(a) of the Federal Rules of Civil Procedure sometimes creates confusion, as it did to the Petitioners, because of its association with the diversity of citizenship real party jurisdictional rule. Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 1967, 51 Minn. L. Rev. 675, 724.

3. Petitioner's argue that the *Roche* judgment deepens an existing conflict among the circuits on whether a non-named defendant can destroy diversity. *Roche* did not hold that; rather, it held that Lincoln Property Company was a named and served party which was in a partnership with the other general or limited partners whose citizenship was never proven.

4. The Fourth Circuit's decision did not address the merits of the plaintiff's initial appeal from the district court. "Finding that we lack subject matter jurisdiction, we can not address the merits of the case." *Id.* at 622.

5. Petitioner attached "Appendix J," found at page 96(a) of their Petition a diagram that is inaccurate. While the top box shows "EQR/Lincoln Limited Partnership" having a general partner and a limited partner, it neglects to have a third line coming out from the top box showing another limited partner, namely Lincoln Eastern Management Corp., which according to the Partnership Agreement of EQR/ Lincoln Limited Partnership is both a general partner and a limited partner. *Id.* at 618-19, and n.11 at 618-19.

6. While Petitioner Lincoln claims they presented extensive declarations of general counsel for corporations and limited partnerships (Pet. 4-5), these statements only contained mere conclusions, stating such things as "the principal place of business" of the entity is such and such. Lincoln never presented the *facts* or the *underlying basis* for making these statements. The *Roche* court stated it best: "When jurisdiction is challenged, courts generally do not accept the *carte blanche* naked allegations of diverse citizenship or bald assertions of jurisdictional facts." *Id.* at 617.

REASONS FOR DENYING THE PETITION

I. Lincoln Has Not Articulated A Compelling Reason To Justify Discretionary Review By This Court

Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction when the law is so well settled and no conflict exists in the circuits on the issue. The patently mistaken argument of Lincoln, claiming that there is a split in the circuits in that some hold that the "real party in interest" analysis applies to only determining a *plaintiff's citizenship and not a defendant's at all* (Pet. 8) is nowhere to be found in any of the cases they cite for that proposition. The second claim of Lincoln is a misstatement of the Fourth Circuit's Opinion. The Fourth Circuit never held that the citizenship of a limited partnership is determined by a "very close nexus" analysis.

Even if the Court perceives that confusion exists over the "real party in interest" jurisdictional rule because of the dicta discussion in *Roche*, this is not the case to grant a review. The *Roche* case is a true *Cardon* set of facts—the defendant's own evidence demonstrated it was a partnership; therefore, each member of the unincorporated association or limited partnership must be shown to be diverse.

II. The Question Presented By Petitioner Of Whether An Entity Not Named As A Defendant In The Lawsuit Can Nonetheless Be Deemed A "Real Party In Interest" To Destroy Diversity Of Citizenship Has Been Answered But Is Irrelevant In A "Persons Composing" Test Case

A. The Supreme Court Has Applied The "Persons Composing" Test To All Forms Of Unincorporated Associations (Except For A Business Trust Like In *Navarro*) And Since Lincoln Was Treated Like A Partnership, This Issue Is Moot

Petitioner completely baffled everyone as to the type of entity it was. "Given the manner in which Lincoln conducts business (using many different structures) and the confusion which is created thereby," it even confused the circuit court. *Roche*, at 621 n.16. As a result the court treated Petitioner as an unincorporated association. This Court has consistently required that all members of such entity to be diverse from that of the opposing party. *Chapman v. Barney*, 129 U.S. 677 (1889), where a joint stock company was not treated as a corporation; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), involving a "limited partnership association;" and in *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1945), a labor union.

The Fourth Circuit correctly applied *Cardon*, in which each person composing the limited partnership was counted. But since Petitioner could not, or would not, disclose all of the necessary "partners" and jurisdictional facts, "[T]he negative inferences resulting from these obscurities, however, must be borne by Lincoln, who created them, not the Roches and not the federal courts." *Roche*, at 619-620. Accordingly, the court did not need to examine a "not named" defendant;

Petitioner simply did not carry its burden in proving the citizenship of these members of the unincorporated association.

B. This Court Has Examined An Entity Not Named As A Party To Find A Lack Of Diversity Of Citizenship

In *Chapman*, *supra*, the Court found that the record did not show the citizenship of any members of the joint stock company, which members were not named parties to the lawsuit. The same was done in *Great Southern*, *supra*, and in *Bouligny*, *supra*, the latter case where the not named members were defendants who destroyed diversity jurisdiction.

III. There Is No Circuit Split On The Question Presented

A. The Law Is Clear On The Jurisdictional Rule

Lincoln misunderstands the real party in interest concept as a jurisdictional rule. It has confused the procedural rule of having to name a real-party-in-interest under Rule 17(a) with the jurisdictional rule for testing subject matter jurisdiction on the basis of diversity of citizenship. Ironically, the Fourth Circuit and Lincoln both rely upon this Court's decision in *Navarro*.

In *Navarro*, the Court clearly pointed out as follows:

> "There is a 'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy.

> But the two rules serve different purposes and need not produce identical outcomes in all cases. Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L.Rev. 243, 247-250 (1978); see 6 C. Wright & A Miller, Federal Practice and Procedure § 1556, pp. 710-711 (1971)." 44 U.S. 462-463, n. 9.

The Texas Law Review note explains that since the early 1800's, the real party in interest rule has guided federal courts in the application of the diversity jurisdiction statute whenever the named parties were not the parties considered for diversity. It states that the rule of jurisdiction is related to the procedural mandate embodied in Rule 17(a) of the Federal Rules of Civil Procedure, but is distinct and older in origin.

> [B]ut the jurisdictional rule continues as a general rule governing which parties are relevant for jurisdictional purposes. . . . The Supreme Court reaffirmed the real-party-in-interest rule, in *Lumberman's Mutual Casualty Co., v. Elbert*, [348 U.S. 48 (1954)], holding that an out of state insurer could be sued in diversity under a state direct-action statute without regard for the citizenship of the insured. 56 Texas L. Rev. 248-249.

In *Lumberman's Mutual*, the Court found that the insurer was not a formal party, but had a substantial legal interest in the action. However, the jurisdictional real party in interest

concept was applied to a defendant. The note points out that even though 28 U.S.C. § 1332(c) has since overruled the direct-action suits as far as insurance cases, the Supreme Court has upheld "determination of the parties relevant for diversity purposes by first considering the parties' substantive rights and liabilities from the point of view of the complaint. If the court finds that a party contesting a suit is merely a nominal party, then it looks to a more appropriate party for diversity purposes." 56 Texas L. Rev. at 249-50.

Also, cases cited in *Navarro* applied the real party in interest concept to both plaintiffs and defendants: *Bouligny*, *supra*; *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 14 L. Ed. 953 (1854); and *St. Louis & S. F. R. Co. v. James*, 161 U.S. 545 (1896); cited by *Navarro*, 446 U.S. at 461; and *Thomas v. Board of Trustees*, 195 U.S. 207 (1904), *Navarro* at 463. *See also Wood v. Davis*, 18 How. 467, 15 L. Ed. 460 (1856), where **defendants** were tested as to whether or not they were parties in interest in deciding diversity jurisdiction.

Petitioner suggests that the Fourth Circuit "conflated" the words "parties in interest" from 28 U.S.C. § 1441(b) with the concept of "real party in interest" of Federal Rule of Procedure 17(a). Pet. 10. But, the Petitioner is the one who misunderstands the concept of the real party in interest as a jurisdictional rule, probably because of its partial reading of a footnote in the case it so heavily emphasized, *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171 (9th Cir. 1979). Pet. 19. There, Petitioner argued "As then-Judge Kennedy explained, '[t]he real party in interest concept is correctly applied *only* to those persons prosecuting an action, not to a defendant.'" *Simpson*, at 1173 n.2 [emphasis added by Petitioner]. Pet. 19. However, the remainder of the footnote revealed that this was referring to the procedural Rule 17, and

that "the district court here clearly intended the nomenclature to mean that the parent corporation was the proper party **defendant** to the action." *Simpson*, at 1173 n.2. [emphasis added].

B. There Is No Massive Uncertainty Over Whether Non-Named Affiliates Will Destroy Diversity Jurisdiction, Causing Panic To The Business Community

Just as there exists no "deep circuit conflict" created by utilization of the "real party in interest" concept, there is no reason to adopt Petitioner's fear that real estate property managers will have no access to the federal courts as a result of *Roche*. If true diversity of citizenship exists between all of the parties, then the federal courts will be open to the diverse entities. For nearly two centuries the precedence of diversity of citizenship has been the character of federal jurisprudence for out of state business entities.

Respondents have been advised that an *amicus* brief will be filed on behalf of real estate interested associations. Anticipating that the realtors' brief will be adopting Lincoln's flawed argument, it is respectfully submitted that all these concerns were questioned and answered in the unanimous decision of *Bouligny*, *supra*, and readdressed in *Cardon*, 494 U.S. at 196-97.

C. The Fourth Circuit's Judgment Pronounced No New Citizenship Test For A Limited Partnership

As explained in the Introduction and in the Counter-Statement of the case, *supra*, Petitioner has taken out of context the use of the words "a very close nexus," which was mentioned one time in dicta. *Roche* at 621. Broken down,

the Fourth Circuit's decision is a very benign and easy to understand holding, which is that the burden of establishing diversity remained with the Petitioner. "And, Lincoln failed to carry its burden." *Id.*

As pointed out by the Fourth Circuit, the issue of diversity was extensively litigated in the district court. Lincoln failed to present facts which could overcome its own "uncontroverted evidence" [*id.* at 616] that Lincoln was a partnership and not a company; that one of its partners, as identified in its Web site and in testimony by another Lincoln official, was an undisputed Virginia resident. In attempting to overcome the affirmative evidence that it was a partnership, Lincoln placed into the evidence convoluted and confusing explanations as to who these partners and partnerships and entities were.

Upon having its diversity of citizenship challenged, Lincoln made conclusory statements, did not present evidence of who were all of its corporate partners, whether limited or general, nor introduced facts to show the location of their principal places of business, one of the criterion for a corporate entity's citizenship. 28 U.S.C. § 1332(c)(1). Yet Lincoln's Petition at page 24 cites and relies on *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1983), a case that demonstrated the type of underlying factual basis necessary for establishing a corporate partner's principal place of business. *Id.* at 59-60.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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